(3)

NO. 04-420

IN THE

# Supreme Court of the United States

ROBERT P. LARGESS, ET AL.,
*Petitioners*,

*v.*

SUPREME JUDICIAL COURT FOR THE
STATE OF MASSACHUSETTS, et al.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF IN OPPOSITION FOR THE STATE RESPONDENTS

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## Questions Presented

Whether the District Court properly denied petitioners' request for a preliminary injunction against enforcement of the decision of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003), including the questions:

1. Whether petitioners' Guarantee Clause claim is entirely dependent on claims of state law error, and thus is essentially an impermissible attempt to obtain federal court review of a state court's decision on a matter of state law;

2. Whether a Guarantee Cause claim by an individual against a State is justiciable;

3. If such a claim is justiciable, whether petitioners allege any concrete injury to themselves sufficient to confer standing to maintain such a claim; and

4. Even if such a claim is justiciable and petitioners have standing, whether the claim fails on its merits because *Goodridge* leaves fully intact the ultimate control of the people of the Commonwealth over their government and their laws – including control of whether same-sex marriage should be permitted in the Commonwealth.

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Pursuant to United States Supreme Court Rule 15, the state respondents submit this brief in opposition to the petition for a writ of certiorari filed by Robert P. Largess, *et al.*, who were plaintiffs and appellants below.

## Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported a 373 F.3d 219 (1st Cir. 2004) and is reproduced in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 1a-19a. The opinion of the District Court for the District of Massachusetts denying plaintiffs' motion for a preliminary injunction is reported at 317 F.Supp.2d 77 (D. Mass. 2004) and is reproduced at Pet. App. 20a-35a. The opinion of the Court of Appeals denying plaintiffs' motion for an injunction pending appeal is unreported but reproduced at Pet. App. 41a-43a. The order of the United States Supreme Court dated May 14, 2004, denying petitioners' injunction pending appeal is reported at 124 S.Ct. 2157 (2004) and reproduced at Pet. App. 45a.

## Jurisdiction

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). Regarding Questions 3, 4, and 5 presented by the petition, the respondents state that this Court lacks jurisdiction to review the question whether the Massachusetts Supreme Judicial Court correctly interpreted and applied Massachusetts law in *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003), because the question is one of state, not federal law.

## Facts and Prior Proceedings

For purposes of this Brief in Opposition to the Petition for a Writ of Certiorari, the state respondents accept and incorporate by reference the statement of facts and prior proceedings set forth in the decision of the United States Court of Appeals for the First Circuit (Pet. App. 2a-6a.) with the exception of the statements that the judgment and related orders and opinions of the Supreme Judicial Court require that the Commonwealth "recognize" the marriage of same-sex couples: the proper characterization of these holdings is that they require the Commonwealth to allow such marriages on the same terms available to opposite-sex couples.[1]

## Constitutional Provision Involved

The Guarantee Clause of Art. IV, § 4, of the United States Constitution provides:

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[1] The state defendant-respondents are the Justices of the Supreme Judicial Court in their official capacities, the Massachusetts Department of Public Health (the Department), and the Commissioner of the Massachusetts Department of Health (the Commissioner) in her official capacity. Pet. App. 1a. The Department and the Commissioner were presumably named as defendants because each is an agency or official with responsibility to implement the judgment of the Supreme Judicial Court in *Goodridge*. In light of the secondary role of the Department and the Commissioner in petitioners' current challenge to the decision of the Supreme Judicial Court, the respondents intend to move to dismiss the Department and the Commissioner from the case or have them designated as nominal parties.

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

**Reasons for Denying the Writ**

Pursuant to United States Supreme Court Rule 10, "[r]eview on a writ of certiorari is not matter of right, but of judicial discretion." The purpose of certiorari jurisdiction is to limit the docket of the Court to cases "of such gravity and general importance" as to warrant plenary review. *In re Woods*, 143 U.S. 202, 206 (1892). For the reasons stated below, the petition does not present a federal question that satisfies the criteria for certiorari review.

## I. THE INTERLOCUTORY NATURE OF THE CHALLENGED ORDER DENYING PRELIMINARY RELIEF COUNSELS AGAINST REVIEW BY CERTIORARI.

While the Court has jurisdiction to review interlocutory judgments of the courts of appeals under 28 U.S.C. § 1254(1), it does not ordinarily grant such review. *American Construction Co. v. Jacksonville, T. & K.W. Railway* Co., 148 U.S. 372, 384 (1893). The interlocutory nature of the order at issue may "of itself alone" furnish "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Here, petitioners seek review of the order of the District Court denying preliminary relief. No final judgment has been entered by the District Court. There may be further proceedings there. Petitioners cite no circumstances that would justify plenary review at this stage of the proceedings. In these circumstances, the Court should deny plenary review.

## II. THE PETITION SEEKS TO DRAW FEDERAL COURTS INTO REVIEWING DECISIONS OF A STATE'S HIGHEST COURT ON MATTERS OF STATE CONSTITUTIONAL LAW.

Petitioners argue that the Supreme Judicial Court "exceeded its powers when it heard the *Goodridge* case" and "violated the separation of powers by improperly using a judicial decision to amend the Massachusetts Constitution." Pet. 25. These violations, say the petitioners, violated their rights under the Guarantee Clause of the United States Constitution. Pet. 29. Thus, petitioners' federal claim, as they themselves repeatedly frame it, is wholly dependent on establishing that the Massachusetts Constitution means something other than what the Supreme Judicial Court has already ruled that it means.

This Court should be extremely leery of being drawn into considering the merits of such a claim, given the obvious potential it creates for friction between federal and state courts and consequent damage to established policies of comity and federalism. The Guarantee Clause was never intended to furnish a vehicle for federal court review of state court decisions. This Court should not open the door to such claims now. A variety of rules and doctrines serve to prevent such a result, including the rule that a state's highest court's decisions on issues of state law

are conclusive on the federal courts; the policies underlying the *Rooker- Feldman* doctrine; the Eleventh Amendment; Article III standing requirements; and the non-justiciability of individuals' Guarantee Clause claims against their States. This Court should deny the petitioners' attempt to turn the Guarantee Clause into a vehicle for embroiling federal courts in second-guessing states' highest courts on any decision of state constitutional law (or, indeed, on any issue of state law) with which any citizen might disagree.

### A. The Decision of a State's Highest Court on a Matter of State Constitutional Law is Binding on the Federal Courts.

Petitioners' focus on the Supreme Judicial Court's supposed errors of law is misplaced, because, as the Court of Appeals noted, federal courts generally "treat the decisions of the highest state courts as controlling interpretations of state law." Pet App. 6a (citing *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (other citations omitted)). "The proposition [is] fundamental to our system of federalism[.]" *Johnson*, 520 U.S. at 916.

Petitioners allege that the Supreme Judicial Court violated the separation of powers provision of the Massachusetts Constitution by (1) exercising jurisdiction over the *Goodridge* case in the first place and (2) assertedly redefining marriage in a way that only the Legislature may do. Pet. 22-29. The first argument was expressly rejected in the Supreme Judicial Court's May 7, 2004, unanimous *per curiam* order, as well as by implication from the fact that the argument had earlier been presented to the Supreme Judicial Court in an *amicus* brief yet the court found no need even to comment upon it. The second argument was rejected by the

*Goodridge* majority opinion, and a variant of the argument (that the mention of marriage in the Massachusetts Constitution of 1780 somehow constitutionalized the definition of marriage) was rejected by Justice Spina, one of the dissenters from the main *Goodridge* decision.

Although petitioners, virtually ignoring the Supreme Judicial Court's actual rulings on these issues, go on to assert that the alleged violations of the state Constitution were also a violation of the federal Guarantee Clause, it is clear that at bottom petitioners complain solely of errors of state law and that their Guarantee Clause claim is wholly derivative of those claimed errors. But the only issue even conceivably open here is exceedingly narrow: whether the Massachusetts Constitution itself, as authoritatively construed by the Supreme Judicial Court, violates the Guarantee Clause.

Even that issue appears to be foreclosed, at least in these circumstances. In *Forsyth v. Hammond*, 166 U.S. 506 (1897), a state supreme court's decision concerning municipal boundaries was challenged on state separation of powers grounds as intruding on the state legislature's powers; the Court rejected the notion that such a state court decision might violate the Guarantee Clause. Id. at 515-16, 518-20. The Court said:

> It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but *there is nothing in the federal constitution to prevent the people of a state from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature.* The preservation of

> legislative control in such matters is not one of the essential elements of a republican form of government which, under section 4 of article 4 of the constitution, the United States are bound to guaranty to every state in this Union; and, whenever the supreme court of a state holds that under the true construction of its constitution and statutes the courts of that state have jurisdiction over such matters, the federal courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the federal constitution.

Id. at 519 (emphasis added). *See also In re Duncan*, 139 U.S. 449, 460-62 (1891) (question whether state statute had been properly enacted in accordance with state constitution was matter for final determination of state courts and raised no question under Guarantee Clause); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612-13 (1937) (claim that state statute delegated legislative power to agency in violation of state constitution had already been rejected by state's highest court, whose decision on that issue was controlling; statute did not violate Guarantee Clause, and even if it did, Clause was not judicially enforceable). Similarly, in this case, petitioners' claim under the Guarantee Clause reduces to a claim that the decision of the Supreme Judicial Court violated the Massachusetts Constitution. This claim does not present a federal issue within the jurisdiction of this Court.

### B. The Policies Underlying the *Rooker-Feldman* Doctrine Support the Denial of the Preliminary Injunction by the District Court.

The *Rooker-Feldman* doctrine is a further factor demonstrating the lack of jurisdiction in the District Court to review the Supreme Judicial Court's decisions on issues of state constitutional law. Although *Rooker-Feldman* may not necessarily apply where the plaintiff in the federal action was not a party to the state action, *e.g., Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 629 & n.11 (1st Cir. 1990), the policies underlying *Rooker-Feldman* are directly applicable the District Court. The doctrine holds that the lower federal courts have no appellate jurisdiction to review decisions of state courts, even where it is alleged that the state court decision was unconstitutional. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983).

> The *Rooker-Feldman* doctrine precludes [federal district] courts from exercising subject matter jurisdiction where the issues presented in the case are 'inextricably intertwined' with questions previously adjudicated by a state court, such that the federal district court would be in the unseemly position of reviewing a state court decision for error. *See Hill v. Town of Conway*, 193 F.3d 33, 39 (1st Cir. 1999) (noting that a federal claim is "inextricably intertwined" with a state-court claim "if the federal claim succeeds only to the extent that the state court wrongly decided the issues

before it.")[.]

*Mills v. Harmon Law Offices, P.C.*, 344 F.3d 42, 44 (1st Cir. 2003) (citing *Feldman*; additional citations and footnote omitted). Here, petitioners directly challenge the decision of the Supreme Judicial Court and the Justices thereof on the basis that "the state court's action was unconstitutional," the very sort of claim *Feldman* itself said is barred. 460 U.S. at 486. The issues petitioners argue here are "inextricably intertwined" with questions previously adjudicated by the Supreme Judicial Court; petitioners' Guarantee Clause claim, as they themselves have framed it, "succeeds only to the extent that the state court wrongly decided the issues before it." *Mills*, 344 F.3d at 44 (citations and quotations omitted); *see Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994).

### C. The Eleventh Amendment Casts Further Doubt on the Jurisdiction of the Court Below to Review A Claim Against a State Court under the State Constitution.

The futility of the claim below is further shown by the Eleventh Amendment, under which a federal court lacks jurisdiction to review state officials' compliance with state law or to order state officials to comply with state law. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). The courts below correctly denied the petitioners' attempt to evade this rule by wrapping their claims of state constitutional violations in the mantle of the Guarantee Clause.

Were it otherwise, virtually any question of a state official's compliance with state law--constitutional, statutory, regulatory, or common law--could be brought before the federal courts. A plaintiff could simply allege that the official's action somehow exceeded the bounds of the authority granted, either directly or indirectly, by the people, and thereby violated the Guarantee Clause. The Eleventh Amendment cannot be so easily defeated.

The central and indispensable premise of petitioners' Guarantee Clause claim here is that the Supreme Judicial Court exceeded its powers under the Massachusetts Constitution. Under the Eleventh Amendment, that is quintessentially a matter for the Supreme Judicial Court alone to adjudicate.

In light of all of the foregoing, the Supreme Judicial Court's decision that it had jurisdiction under the Massachusetts Constitution to decide the *Goodridge* case, and to hold that Massachusetts marriage statutes violated the Massachusetts Constitution, must be taken as a given, beyond review by any federal court. The sole question possibly within the jurisdiction of the federal courts would be whether the Massachusetts Constitution, *as so interpreted*, violates the Guarantee Clause. But even that issue is foreclosed by cases such as *Forsyth*, 166 U.S. at 519, *In re Duncan*, 139 U.S. at 460-62, and *Highland Farms Dairy*, 300 U.S. at 612-13, discussed in Arg. II.A, above. Therefore, the petition could be denied as well "for lack of subject-matter jurisdiction because of the inadequacy of the federal claim," because "the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (citations and internal quotations omitted). At the least, these factors demonstrate why this case is not suitable

for plenary review.

## III. THE COURT SHOULD NOT GRANT REVIEW OF THE JUSTICIABILITY OF PETITIONERS' CLAIMS BECAUSE (1) THEY DID NOT SUFFER AN ADVERSE JUDGMENT ON THAT ISSUE BELOW AND (2) THERE IS NO SIGNIFICANT SPLIT OF DECISIONS IN THE LOWER COURTS IN CASES BROUGHT BY INDIVIDUALS AGAINST STATES UNDER THE GUARANTEE CLAUSE.

Petitioners first argue that this Court should grant review because the "First Circuit and numerous state supreme courts are in conflict with the Second and Ninth Circuits on the issue of the justiciability of the Guaranty Clause." Pet. 8. This asserted conflict does not warrant review because (1) the petitioners did not suffer an adverse judgment on this issue in the Court of Appeals, (2) there is no significant conflict of authority on the issue whether a claim by *a private person against a State* is justiciable.

First, a party may not ordinarily seek review of a judgment – or a portion thereof – favorable to him. *See Forney v. Apfel*, 524 U.S. 266, 271 (1998). While a party may appeal a decision "granting in part and denying in part the remedy requested," *id.*, petitioners cite no case in which a party may appeal a portion of a judgment or opinion favorable to him.

In this case, the Court of Appeals did not hold that petitioners' complaint should be dismissed for lack of justiciability. Instead, it stated that "resolving the issue of justiciability in the Guarantee

Clause context may also turn on the resolution of the merits of the underlying claim." Pet. App. 8a, 9a. It then decided the merits of the case adversely to petitioners. Pet. App. 10a-18a. In these circumstances, petitioners lack standing to seek review of the question of justiciability. No judgment of this Court on the justiciability issue would improve their position. For this reason alone, the Court should deny review of this issue.

Second, this Court should deny review on this issue because three is no significant split of authority on the non-justiciability of a claim by a private person against a State under the Guarantee Clause. This Court has already made clear that Guarantee Clause claims brought by individuals challenging their state governments are non-justiciable. Such a claim was first found non-justiciable in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), and since 1912, when non-justiciability was reaffirmed in *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912), petitioners cite not a single case in which such a Guarantee Clause claim was found justiciable.

The Court has more recently suggested, without deciding, that "perhaps not all claims under the Guarantee Clause present non-justiciable political questions." *New York v. United States*, 505 U.S. 144, 183-86 (1992). The court cited various commentators, the first of whom was Professor Tribe, as supporting the view that "courts should address the merits of such claims, at least in some circumstances." Id. at 184, 185. But this must be read in light of the view actually expressed by Professor Tribe in the passage cited by the *New York* Court: that courts should enforce the Guarantee Clause in order to protect the *States* from *federal* interference, not to grant individuals the right to challenge state governmental forms. The Clause "recognizes in the National Government a duty, running directly 'to every state in this Union'

rather than to individuals, to respect the state's most fundamental structural choices as to how its people are to participate in its own governance[.]" L. Tribe, *American Constitutional Law* 398 (2d ed. 1988).

> To be sure, the Supreme Court has denied that the guaranty clause of article IV, § 4, confers judicially cognizable rights upon *individuals*. . . . [I]t need not follow from the unavailability of the guaranty clause as a textual source of protection for *individuals* that the clause confers no judicially enforceable rights upon *states as states*. It is, after all, the states to which the clause extends its explicit guarantee. If courts are once again to take up the task of preserving for states their constitutionally essential role as self-governing polities, the guaranty clause might well provide the most felicitous textual home for that enterprise.

*Id.* at 398 (emphasis in original; footnote omitted). *New York v. United States*, of course, involved exactly that sort of claim--a state seeking protection from the exercise of federal power. This case is entirely different--an attack by individuals to restrain what they claim, based on a single judicial decision, to be an impermissible form of state government.

Petitioners attempt to bolster their justiciability claim with the assertion that "[t]he Court, in *New York* stated that not all Guarantee Clause claims are non-justiciable " and that "[t]his was reaffirmed by" *Printz v. United States*, 521 U.S. 898 (1997)." Pet. 10. But *Printz*, too, was about a state seeking protection from exercises of federal power. Id. at 904-05. The Guarantee Clause was mentioned, once, as but one of many federal

constitutional provisions recognizing that "the Constitution established a system of dual sovereignty," federal and state. Id. at 918-19 (citations and internal quotations omitted). The Clause was described as "'presuppos[ing] the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights.'" Id. at 919 (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 414-415 (1938)). No mention was made of the Clause as a source of individual rights against states, and notwithstanding plaintiffs' further claim (Pet. 10) that *Printz* "reaffirmed" the *New York* Court's suggestion that not all Guarantee Clause claims were nonjusticiable, there was simply no discussion at all in *Printz* of the justiciability of Guarantee Clause cases.

The Court recently denied *certiorari* in circumstances similar to those present here. In *Guinn v. Legislature of the State of Nevada*, 71 P.3d 1269 (Nev. 2003), the Nevada Supreme Court, on petition of the governor, resolved a state constitutional dispute by issuing a writ of mandamus against the state legislature. Members of the state legislature sought certiorari, presenting the question as whether the state court's "effective nullification of a key, recently enacted structural provision of the Nevada State Constitution violates the Republican Guarantee Clause of Article IV of the United States Constitution." *See* Petition for Writ of *Certiorari* in *Angle v. Guinn*, No. 03-1037, 2004 WL 113601 (Jan. 20, 2004). This Court denied *certiorari* on March 22, 2004. *Angle v. Guinn*, 124 S. Ct. 1662 (2004). In light of the decisions of this Court on the issue of justiciability of private claims against States, the decisions of the lower courts cited by the petitioners do not establish a split of authority that warrants review by this

Court.[2]

## IV. THE COURT SHOULD NOT GRANT REVIEW OF THE QUESTION OF STANDING BECAUSE (1) THE PETITIONERS DID NOT SUFFER AN ADVERSE JUDGMENT ON THAT ISSUE BELOW AND (2) THE ASSERTED SPLIT OF AUTHORITY ON THE ISSUE IS NOT SIGNIFICANT.

Next, petitioners assert a "conflict among the circuit courts on the issue of who has standing to bring a Guarantee Clause claim." Pet. 15 (emphasis added). This asserted conflict does not warrant review because (1) the petitioners did not suffer an adverse judgment on this issue in the Court of Appeals, (2) the cited split is in any event insignificant.

First, the Court of Appeals did not hold that petitioners lacked standing to maintain their complaint. Rather, it determined that the "circumstances of this case present a rare instance in which the standing issue is intertwined and inseparable from the merits

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[2] *O'Hair v. White*, 675 F.2d 680, 684 n.5 (5th Cir. 1982), and *Murtishaw v. Woodford*, 255 F.3d 926, 961 (9th Cir. 2001), cited by petitioners (Pet. 14), both rejected the justiciability of claims by individuals against state officials under the Guarantee Clause. The other state cases cited by the petitioners (Pet. 11-14) do not concern the justiciability of a private claim against the decision of a State court and do not support plenary review of such a claim.

of the underlying claim." Pet. App. 7a. "If the plaintiffs are correct that the Guarantee Clause extends rights to individuals in at least some circumstances, then the usual standing inquiry--which distinguishes between concrete injuries and injuries that are merely abstract and undifferentiated– might well be adjusted to the nature of the claimed injury." Pet. App. 7a-8a (citation omitted). The Court of Appeals rejected petitioners' Guarantee Clause claim on its merits. Pet. App. 10a-18a. These determinations do not make the petitioners an aggrieved party entitled to seek review of the question of standing in this Court.

Second, even if petitioners may seek review of the standing question, they have not demonstrated a split of authority that would merit such review. The Court may grant review where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." United States Supreme Court Rule 10(a). Other than the decision of the First Circuit -- which did not dismiss their complaint for lack of standing to bring their claim -- petitioners cite merely a decision of the United States District Court, *Adams v. Clinton*, 90 F.Supp.2d 27, 33 (D.D.C. 2000), and an unpublished decision of the Court of Appeals for the Second Circuit, *Schulz v. Jennings*, 198 F.3d 234 (2d Cir. 1999), which affirmed an unpublished decision of the District Court for the Northern District of New York. The alleged "split" between these authorities does not support plenary review.

First, the "Court tries to achieve uniformity in federal matters only among the various courts whose decisions are otherwise final in the absence of Supreme Court review – the courts of appeals, other federal courts of the same stature, and the highest state courts in which decision may be had." R.L. Stern, *et al.*, *Supreme Court Practice* (8th ed.) 237. Decisions of district

courts do not ordinarily meet this standard. Reliance on the District Court opinion in *Adams* is particularly inapt here because the facts there – which concern an issue of governmental organization apparently unique to the District of Columbia–are not likely to recur.

Nor does the alleged split between the First and Second Circuits merit review. A conflict of decisions in the lower courts is ordinarily not reviewed by this Court unless it is "real and embarrassing.". *Rice v. Sioux City Cemetary*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)). Citation to one unpublished decision does not demonstrate a conflict of authority worthy of plenary review.

## V. THE DECISION OF THE COURT OF APPEALS PROPERLY INTERPRETS THE GUARANTEE CLAUSE AND DEMONSTRATES THAT THIS CASE PRESENTS AN INSUBSTANTIAL CLAIM THAT WOULD BE AN INAPPROPRIATE VEHICLE FOR CONSIDERATION OF THE CLAUSE.

Even assuming that petitioners' Guarantee Clause claim is justiciable and they have standing to maintain it, the Court of Appeals correctly rejected the claim. Once again, the only question open on a Guarantee Clause claim in this case would be not whether the Supreme Judicial Court was *correct* in interpreting the Massachusetts Constitution as requiring it to decide *Goodridge* as it did, and as granting it jurisdiction to decide *Goodridge* in the first place, but instead whether the

Massachusetts Constitution, *as so interpreted*, violates the Guarantee Clause. It plainly does not. In *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175-76 (1874), the Court noted that the state governments in place when the Constitution was adopted were "presumed" to be consistent with the Guarantee Clause. The Commonwealth is one of those governments, and it is still operating under the Constitution of 1780, with amendments that, if anything, have increased popular control.[3] Petitioners cannot rebut the presumption that the Commonwealth is operating under a "republican form of government."

First and foremost, *Goodridge* does nothing to undermine the ultimate control of the people of the Commonwealth over their government and their laws. The people may still elect their legislators, the Governor, and other statewide constitutional exectuive officers; through their election of those constitutional officers, the people ultimately control appointments in the executive branch; and through their election of the Governor and Council (which confirms judicial appointments), the people ultimately control appointments in the judicial branch. All three branches of government remain under ultimate popular control. Merely alleging some violation of state separation of powers requirements does not make out a Guarantee Clause violation. *Forsyth*, 166 U.S. at 519; *Highland Farms Dairy*, 300 U.S. at 612.

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[3] *E.g.*, Mass. Const. amend. art. 22 (1857) (providing for popular election of state senators, superseding Mass. Const. pt. 2, c. 1, § 2, art. 1); id. amend. art. 48 (1918) (providing for popular initiative and referendum for statutes and constitutional amendments); id. amend. arts. 68, 69 (1924) (making women eligible to vote and hold public office).

Second, and particularly relevant here, the people have at their disposal, and have set in motion, a process for amending the Massachusetts Constitution. Mass. Const. amend. art. 48, Init., Pt. IV. On March 29, 2004, the people's elected representatives in the Legislature gave preliminary approval, by a vote of 105-92, to a constitutional amendment declaring, *inter alia*, that "only the union of one man and one woman shall be valid or recognized as a marriage in the commonwealth." If the 2005-2006 Legislature likewise approves the proposed amendment, it will be placed on the November 2006 ballot for the people's approval or rejection. Mass. Const. amend. art. 48, Init., pt. IV, §§ 2-5.

The drafters of Mass. Const. amend. art. 48 (1918) struck a delicate balance. They expressly recognized that the Supreme Judicial Court's power to review the constitutionality of state statutes--exactly the power it exercised in *Goodridge*--was itself sufficiently important to the functioning of government as to merit constitutional protection from direct popular attack. The drafters granted such protection by excluding measures relating to the "powers of courts" from the initiative process. *Mazzone v. Attorney General*, 432 Mass. 515, 526-27, 736 N.E.2d 358, 368-69 (2000) (citing 2 *Debates in the Massachusetts Constitutional Convention 1917-18* (1918)). At the same time, the drafters recognized that the constitutional amendment initiative process should be available to change the Constitution in response to a particular Supreme Judicial Court judgment, *i.e.*, "effectively, overrule a decision based on State constitutional grounds . . . by constitutional amendment." *Mazzone*, 432 Mass. at 526-28, 736 N.E.2d at 368-70.

Still, the drafters recognized that the process for amending the Constitution should be careful and deliberative. The requirement for approval by two successive Legislatures ensures that, between

the time an amendment is first proposed and the time it may appear on the ballot, not only several years of time elapse within which the people themselves may deliberate, but also that an election intervenes so that a newly elected Legislature has its say. The drafters included neither (1) any specially expedited procedure for constitutional amendments in response to court decisions, nor (2) any procedure for the suspension of court decisions until a responsive amendment could be approved. *Compare* Mass. Const. amend. art. 48, The Referendum, pt. III, § 3 (providing procedure for voter petition to suspend operation of law passed by Legislature, pending voter referendum on whether to repeal law).

Accordingly, that *Goodridge* took effect on May 17, 2004, and a constitutional amendment to overturn *Goodridge* could not appear on the ballot until November 2006, is precisely in conformance with the plan of the Massachusetts Constitution. The people retain ultimate control over their government and their laws, with all of the safeguards against hasty action that are part not only of the Massachusetts but also the federal Constitution, and indeed are basic to the notion of a written constitution in the first place.[4] Nothing in this system offends

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[4] *See In re Duncan*, 139 U.S. at 461:

> By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their

against any conception of a republican form of government. As the Court of Appeals concluded: "The resolution of the same-sex marriage issue by the judicial branch of the Massachusetts government, subject to override by the voters through the state constitutional amendment process, does not plausibly constitute a threat to a republican form of government." Pet. App. 18a. "Absent such a threat," the court said, " our federal constitutional system simply does not permit a federal court to intervene in the arrangement of state government under the guise of the Guarantee Clause." *Id.* The correctness of this holding demonstrates that this case presents an insubstantial claim that would be an inappropriate vehicle for consideration of the Guarantee Clause. The petition should accordingly be denied.

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governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.

## Conclusion

For the reasons stated above, the petition for a writ of certiorari should be denied.

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